**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES HOUSE OF REPRESENTATIVES,<br><br>*Plaintiff,*<br><br>v.<br><br>STEVEN T. MNUCHIN, in his official capacity as Secretary of the United States Department of the Treasury, *et al.*,<br><br>*Defendants*. | Case No. 1:19-cv-00969 |

**UNITED STATES HOUSE OF REPRESENTATIVES' REPLY MEMORANDUM IN SUPPORT OF ITS APPLICATION FOR A PRELIMINARY INJUNCTION**

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## INTRODUCTION

This suit challenges the Administration's expenditure of approximately $6 billion in funds that Congress decided *not* to appropriate for a southern border wall. This Executive Branch action directly injures the House by overriding an appropriations decision: The Administration has taken for itself power that the Constitution vests solely in the Legislative Branch. The Administration now argues that this Court lacks the authority to halt its unconstitutional actions. Those threshold arguments fail, and the Administration's attempts to shield its unconstitutional actions behind statutory provisions that do not authorize the expenditures fare no better. This Court's intervention is necessary now, before the Administration begins construction on the southern border wall using funds that were not appropriated by Congress and cannot be recovered.

The Administration argues that the U.S. House of Representatives lacks standing, relying on cases involving individual legislators and attempting to cast the injury here as merely an "alleged dilution of [the House's] legislative authority" insufficient to establish an injury in fact under Article III. Defs.' Opp'n (ECF No. 36) at 16-17. But this case was not filed by individual legislators seeking to invoke the power of the courts to resolve a political dispute. Plaintiff here is the House and the Administration's actions do far more than affect individual Members – the Administration has usurped Congress's power of the purse, and directly harmed a co-equal branch of government in the process. Under such circumstances, as another court in this district correctly held in *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015), the House has alleged an injury in fact and the Judiciary is empowered to decide this case to restore the balance of powers between the Executive and Legislative branches. "This dispute, in short, 'will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'" *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*,

135 S. Ct. 2652, 2665-66 (2015) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

The Administration's other threshold attempts to avoid judicial review also fail. The House's claims that the Administration has violated the Appropriations Clause and the Administrative Procedure Act (APA) are justiciable, and neither the separation-of-powers doctrine nor the long-defunct doctrine of equitable discretion dictate otherwise. The Administration's argument that the House "should, at a minimum, be required to enact legislation prohibiting the expenditures it seeks to stop before calling upon the Judiciary," Opp'n at 36, misunderstands the case law, the legislative process, and the House's theory of this case: The House passed an appropriations act, but the Administration has determined that it will circumvent the funding restrictions in that act. And, consistent with well-established Supreme Court precedent, the House can sue to prevent these unconstitutional expenditures under recognized principles of equity and under the plain meaning of the APA.

This Court should issue a preliminary injunction to halt the Administration's unconstitutional expenditures on the southern border wall. As the House has established, the Administration's transfer, obligation, and expenditure of funds under 10 U.S.C. § 284 fail to satisfy the conditions in the transfer authority provision the Administration has invoked. The Administration does not dispute that it lacks authority to expend funds on border wall construction under 10 U.S.C. § 2808(a), instead arguing only that no decision has been made. But the House has standing to challenge those expenditures *before* the funds are obligated and the House has

suffered irreparable harm. The remaining preliminary injunction factors weigh strongly in favor of an injunction.[1]

## ARGUMENT

## I. THE HOUSE HAS ARTICLE III STANDING TO BRING THIS SUIT

### A. The House Has Alleged Injury In Fact, And Individual Legislator Cases Are Inapposite

**1.** In opposing standing, the Administration principally relies on the Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997). Opp'n at 18-21. But, *Raines*, unlike this case, involved a suit filed by only "six Members of Congress," 521 U.S. at 814, who alleged an "institutional injury [that was] wholly abstract and widely dispersed," and "both Houses [of Congress] actively oppose[d] their suit," *id.* at 829.

The plaintiffs in *Raines* were four Senators and two Members of the House who had voted against the Line Item Veto Act when it was considered by Congress. After the act was signed into law, they filed suit alleging that the act was unconstitutional. *Raines*, 521 U.S. at 814. The Supreme Court has narrowly interpreted *Raines*, describing it as "holding specifically and only

[1] The Administration had previously invoked only the transfer authority contained in section 8005 of the Department of Defense Appropriations Act, 2019. Just yesterday, however, the Administration filed an updated notice and declaration regarding a new transfer of $1.5 billion and invoking, in part, an additional source of authority: section 9002 of that same act. Second Rapuano Decl. (ECF No. 38-1). This new $1.5 billion transfer is divided in two parts: $818.465 million transferred pursuant to section 8005 and $681.535 million transferred pursuant to section 9002. Second Rapuano Decl. at Ex. C. Because the House's complaint and motion for preliminary injunction only challenge the transfer of funds pursuant to section 8005, the House intends to amend its complaint to also contest the transfer under section 9002. The House avers that section 9002 does not authorize transfers and expenditures on border wall construction for (at least) all of the reasons the House has previously argued. The House nevertheless urges the Court to proceed with the preliminary injunction hearing on May 22, 2019, as scheduled. The Administration has reiterated that it "expects to award contracts for the four [border wall construction] projects by May 16, 2019, and construction will begin no earlier than 45 days after the award of the contracts." Notice of Filing Second Rapuano Decl. at 2.

that 'individual members of Congress [lack] Article III standing.'" *Ariz. State Legislature*, 135 S. Ct. at 2664.

*Raines* itself distinguished that suit by six individual Members whose votes did not carry the day in Congress, from the suit brought by individual legislators in *Coleman v. Miller*, 307 U.S. 433 (1939), whose twenty votes would have carried the day.[2] *Coleman* held that Kansas state legislators had standing to claim an institutional injury after they had voted not to ratify an amendment to the Federal Constitution but, following a deadlocked vote in the state senate, the Lieutenant Governor cast the deciding vote in favor of ratification. 307 U.S. at 437. As the Supreme Court explained in *Raines*, the decision in *Coleman* establishes that "members of the legislature had standing" where, if they "were correct on the merits, then their votes not to ratify the amendment were deprived of all validity." *Raines*, 521 U.S. at 821-23, 822 (citing *Coleman*, 307 U.S. at 438, 441, 446).

The Administration also relies on the D.C. Circuit's decisions in *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), and *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), to argue that *Coleman* does not apply here. Opp'n at 22-25. In the Administration's view, the House's legislative decision here has not been "nullified" because the House could again use its legislative authority to pursue a remedy against the Administration's unconstitutional appropriations. Opp'n at 24. But this argument misses the distinction the courts have drawn between cases like *Coleman*, where the legislator plaintiffs had the necessary votes to act through the legislative process absent the challenged action, and cases like *Raines*, *Campbell*, and *Chenoweth*, where the individual legislators who filed suit lacked the "necessary majorities in the Congress," and, therefore, could

[2] *See United States v. Windsor*, 570 U.S. 744, 806 (2013) (Alito, J., dissenting) (explaining that "the Members in *Raines* – unlike the state senators in *Coleman* – were not the pivotal figures whose votes would have caused the Act to fail absent some challenged action").

not "claim their votes were effectively nullified." *Chenoweth*, 181 F.3d at 117; *see also* Amicus Br. of Former House General Counsels (ECF No 35) at 10-12 (explaining rationale for distinguishing cases involving individual legislators).[3]

This case is not like *Campbell*, *Chenoweth*, and *Raines* where, "[h]aving failed to prevail in their own Houses, the suitors [attempted to] repair to the Judiciary to complain." *Ariz. State Legislature*, 135 S. Ct. at 2664. The House, "in contrast, is an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes" by the Bipartisan Legal Advisory Group. *Id.*; *see* Rule II.8(b), Rules of the U.S. House of Representatives (116th Cong.).[4] As the Supreme Court recently made clear in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." 135 S. Ct. at 2665 (quoting *Raines*, 521 U.S. at 823, describing *Coleman*). The House has standing under this line of cases, as the *Burwell* court found in analyzing a similar Appropriations Clause injury. 130 F. Supp. 3d at 75.

[3] The Administration's reliance on *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977), Opp'n at 29, 34, is misplaced. *Harrington* similarly involved a suit brought by an individual Member of Congress, and the court rejected the argument that he could "intervene on behalf of one member of the Legislative Branch to change the 'rules of its proceedings' adopted by the entire body of the House." 553 F.2d at 214.

[4] "[C]ourts have found congressional authorization to be the 'key' distinguishing factor, 'moving . . . to the permissible category of an institutional plaintiff asserting an institutional injury.'" *Cummings v. Murphy*, 321 F. Supp. 3d 92, 106 (D.D.C. 2018) (citation omitted), *appeal docketed*, No. 18-5305 (D.C. Cir. Oct. 16, 2018); *see also Walker v. Cheney*, 230 F. Supp. 2d 51, 69 (D.D.C. 2002); *Windsor*, 570 U.S. at 806 (Alito, J., dissenting) ("*Raines* dealt with individual Members of Congress and specifically pointed to the individual Members' lack of institutional endorsement as a sign of their standing problem[.]").

**2.** Although the Administration strains to apply *Raines*'s reasoning to this case, none of its arguments succeeds. The Administration relies on *Raines*'s discussion of "historical experience," 521 U.S. at 829, to argue that conflicts between the President and Congress have been political, not judicial, confrontations. Opp'n at 22. But *Raines*'s historical examples primarily involve the absence of suits brought by Presidents to challenge acts of Congress. 521 U.S. at 826-28; *see Burwell* 130 F. Supp. 3d at 80 ("[T]he refusal by several presidents to sue Congress over the Tenure of Office Act hardly answers the question presented by the pending motion."). And there are reasons unrelated to standing that explain the absence of such suits, specifically Congressional immunity under the Speech or Debate Clause, U.S. Const., art. I, § 6, cl. 1.[5]

The Administration also attempts to equate this suit – which was authorized pursuant to House Rule II.8 and filed on behalf of the House[6] – to a suit by individual Members. Opp'n at 23. But the Administration misses the mark by arguing that the House has "concede[d]" that it is bringing this suit for "official capacity" injuries to seats held by its Members as "trustees for their constituents." Opp'n at 23 (quoting *Raines*, 521 U.S. at 821). Similar to *Coleman*, the question here is not whether this is a suit by individual Members for official capacity injuries as in *Raines* or a personal entitlement to a benefit, such as a Member's salary, as in *Powell v. McCormack*, 395 U.S. 486, 496, 512-14 (1969), which *Raines* distinguished, 521 U.S. at 820-21. The question here is whether the *House* has suffered a cognizable injury when it sues as an institution after its vote

[5] *Raines* cited only one example involving an individual Member of Congress failing to sue the Executive Branch regarding a dispute concerning "the validity of President Coolidge's pocket veto that was sustained in *The Pocket Veto Case*." 521 U.S. at 828. *Raines* failed to note that during the same historical period, a House Subcommittee and its Chairman successfully intervened on behalf of the House in a case "involv[ing] a portentous clash between the executive and legislative branches." *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976).

[6] *See* Compl. (ECF No. 1) ¶ 56 & n.117.

to appropriate funds for specific purposes was nullified by the Administration's unconstitutional actions.

The Administration further argues that the House lacks standing because this is a political disagreement and the Founders "gave Congress and the Executive the necessary tools to resolve those disagreements themselves." Opp'n at 16. The Administration is correct that there *was* a political dispute about border wall funding, which resulted in the longest federal government shutdown in history. To resolve that dispute, Congress exercised its constitutional power by appropriating *only* $1.375 billion for the President's border wall. Dissatisfied with the amount appropriated by Congress, the Administration went outside the appropriate political channels to usurp Congress's Article I appropriations power for itself. Because the House's claims here arise from the Administration's defiance of Congress's appropriations power, it is no answer for the Administration to claim that Congress should use that authority to check the Executive Branch's current abuses of power. Judicial intervention is therefore necessary and appropriate here "to constrain the Executive and assure Congress' control over expenditures." *Am. Fed'n of Gov't Emps., AFL-CIO, Local 1647 v. FLRA*, 388 F.3d 405, 414 (3d Cir. 2004) ("To say that the Defense Department can, on its own, carve out an area of nonappropriated funding would create an Executive prerogative that offends the Appropriations Clause and affects the constitutional balance of powers.").

**3.** In many respects this suit is *sui generis* – it is unprecedented for a President to sign an appropriations act on the same day he instructs Administration officials to actively circumvent its funding limitations. But it is clear that under precedent from both the Supreme Court and this Circuit, the House suffers a cognizable injury on the extraordinary facts presented here. The Administration attempts to avoid the result in the most analogous case, *Burwell*, by claiming it

was "incorrect, as it misapplied and ignored binding precedent." Opp'n at 25. Contrary to these arguments, *Burwell* addressed the relevant cases and correctly held that the House had standing to challenge violations of the Appropriations Clause.

The Administration attempts to distinguish *Burwell*, but in doing so misunderstands the theory of the House's case. The Administration argues that "[t]here are no Appropriation Clause principles at issue in this case – because the Executive is not claiming that it can spend funds in the absence of congressional authorization – and there is no substantive difference between the House's constitutional and statutory claims." Opp'n at 26. Although determining whether the Administration has violated the Constitution involves issues of statutory interpretation, that is only because the House exercises its Appropriations Clause authority – as the Clause itself requires – through the enactment of legislation.

The Administration cannot avoid the strictures of the Appropriations Clause any time the "President *claims* that he is acting pursuant" to an appropriations statute: The D.C. Circuit has emphatically rejected this approach to insulating Executive action from judicial review. *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1332 (D.C. Cir. 1996) (holding challenge to Executive Order was judicially reviewable and rejecting argument that President could "bypass scores of statutory limitations on government authority" "so long as the President *claims* that he is acting pursuant to the Procurement Act"). The Administration cites *Dalton v. Specter*, 511 U.S. 462, 471-75 (1994) to support its argument. Opp'n at 42-43. But "*Dalton*'s holding merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available." *Reich*, 74 F.3d at 1331.

*Burwell* correctly explained that the House's theory in that case (as here) "is not about the implementation, interpretation, or execution of any federal statute," but rather "a complaint that the Executive has drawn funds from the Treasury without a congressional appropriation – not in violation of any statute, but in violation of Article I, § 9, cl. 7 of the Constitution." 130 F. Supp. 3d at 70-71. *Burwell* did not claim, and the House does not contend, that the House has standing to police the Executive Branch's execution of the laws without limit. *See* Opp'n at 26. Rather, *Burwell* held that the House has standing "to sue and stop expenditures for which no annual appropriation was enacted." 130 F. Supp. 3d at 70. That is precisely the case here. Despite immense pressure from President Trump, Congress appropriated only $1.375 billion for the wall in an annual appropriations act. It is no answer for the Administration to now claim that Congress should exercise its legislative power to amend the act to prohibit additional expenditures. The law – as enacted by Congress and signed by the President – already does that, and the additional unauthorized expenditures therefore violate the Appropriations Clause.

The Administration attacks the "cases involving congressional subpoena enforcement" as "likewise incorrect and inconsistent with the Constitution's fundamental design, as well as irreconcilable with *Raines*." Opp'n at 31. But the argument that "courts have (erroneously) recognized Congress's authority to enforce subpoenas," Opp'n at 32, is inconsistent with nearly a century of Supreme Court precedent.[7] The D.C. Circuit's admonition in *United States v. American*

[7] *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503-04 (1975) (explaining that "[t]he power to investigate and to do so through compulsory process plainly falls" within Congress's "legitimate legislative sphere" and "[i]ssuance of subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate"); *McGrain v. Daugherty*, 273 U.S. 135, 161, 174 (1927) (explaining that Congress's "power to secure needed information by [compulsory process] has long been treated as an attribute of the power to legislate" and "is an essential and appropriate auxiliary to the legislative function").

*Telephone & Telegraph Co.* that "the House as a whole has standing to assert its investigatory power," 551 F.2d at 391, is binding law and consistent with Supreme Court precedent and Article I.

The Administration at several points relies on Justice Scalia's dissent in *United States v. Windsor*, 570 U.S. 744, 783 (2013), for the proposition that the House does not have standing here. Opp'n at 20, 31, 34. Justice Scalia, however, only criticized a system "in which Congress can hale the Executive before the courts not only to vindicate its own institutional powers to act, *but to correct a perceived inadequacy in the execution of its laws*." *Id.* at 788-89 (emphasis added). In fact, Justice Scalia characterized *INS v. Chadha*, 462 U.S. 919 (1983), as supporting the proposition that the House and Senate have standing to sue where they are "threatened with destruction of what they claimed to be one of their institutional powers." *Windsor*, 570 U.S. at 783 (Scalia, J., dissenting). That is precisely this case.

**B. The House's Claims Are Justiciable**

The Administration urges this Court to decline to resolve this suit because it presents separation-of-powers questions. Opp'n at 32-36. But the Administration mischaracterizes the dispute, arguing that the House is attempting "to use litigation to circumvent the legislative process." Opp'n at 33. As the House has already noted, Congress completed a legislative process following a drawn-out political dispute about border wall funding that resulted in the longest federal government shutdown in history. The Administration lost the political fight, but rather than abide by the appropriations decision made by Congress (and signed by the President), it decided to override it. Now – after ignoring Congressional acts and usurping legislative power – when the House seeks this Court's intervention to restore the balance of powers provided for by the Constitution, the Administration argues that Congress should pass more legislation. That is no answer on the facts here, and this Court's action is sorely needed now.

As the Supreme Court has emphasized, "it is 'the duty of the judicial department' – in a separation-of-powers case as in any other – 'to say what the law is.'" *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also* Br. of Former Members of Congress as *Amici Curiae* (ECF No. 37) (Former Members' Br.) at 14 (collecting cases). Accordingly, in *Burwell*, the court held that the House's Appropriations Clause claim – "that, despite an intentional refusal by Congress to appropriate funds . . . the Secretaries freely ignored Article I, § 9, cl. 7 of the Constitution and sought other sources of public money" – "presents a question of constitutional interpretation for the Judiciary, which provides 'the primary means through which [constitutional] rights may be enforced.'" *Burwell*, 130 F. Supp. at 80 (quoting *Davis v. Passman*, 442 U.S. 228, 241 (1979)); *id.* ("[T]he mere fact that the House [] is the plaintiff does not turn this suit into a non-justiciable 'political' dispute."). Similarly, faced with an enforcement action for a Congressional subpoena issued to the Attorney General, the court held the case justiciable, noting that "[t]o give the Attorney General the final word would elevate and fortify the executive branch at the expense of the other institutions that are supposed to be its equal, and do more damage to the balance envisioned by the Framers than a judicial ruling on the narrow privilege question posed by the complaint." *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 12 (D.D.C. 2013).

The Administration argues "that Congress could expressly restrict or bar the Executive's use of § 8005 and § 2808" for the construction of a border wall, Opp'n at 34, and suggests that the House should remedy its injury by passing appropriations legislation that "withhold[s] funding for the President's preferred programs," Opp'n at 24. But that argument turns the appropriations process on its head and misses the point of the House's suit, which is that these statutes – *as currently enacted* without amendments – do not authorize the Administration's expenditure of

funds on the construction of a border wall. Contrary to the Administration's position, the Supreme Court has made clear "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

Congress should not, and indeed cannot, be required to pass a law to prevent the Executive Branch from doing what the Constitution already forbids.[8] Because the Administration lacks a valid Congressional appropriation, the transfer, obligation, and expenditure of the funds at issue in this case violates the Appropriations Clause. For similar reasons, this suit does not, as the Administration contends, "frustrate[] [the] constitutional design" of bicameralism and presentment. Opp'n at 33. This argument depends on the Administration's assertion that the House wants to "bar the Executive from using its authority pursuant to § 8005 or § 2808 to undertake barrier construction." Opp'n at 33. But the House's contention is that the Executive Branch *has no such authority* – as the House's application makes clear – and it has invoked these provisions to paper over its Appropriations Clause violations.[9]

"Where [a] dispute consists of a clash of authority between the two branches[]," the D.C. Circuit has stated in no uncertain terms that "judicial abstention does not lead to orderly resolution of the dispute." *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 126 (D.C. Cir. 1977). And

[8] The Administration cites *Campbell* for the proposition that the House's dispute should be resolved through "political self-help." Opp'n at 35 (citing 203 F.3d at 21, 24l). As *amici curiae* the former General Counsels of the House explain, however, this case simply stands for the proposition that individual Members of Congress lack a cognizable injury when Congress retains the power to countermand executive action, but their votes are insufficient to cause Congress to act. Br. of Former General Counsels of the U.S. House of Representatives as *Amici Curiae* (ECF No. 35) (Former House GCs' Br.) at 15-17.

[9] Courts have consistently held that each House of Congress may independently engage in litigation to protect its own institutional interests. Former House GCs' Br. at 8 & n.4 (collecting cases).

"*AT&T* was based on solid precedent," as earlier cases had "establish[ed], at a minimum, that the mere fact that there is a conflict between the legislative and executive branches . . . does not preclude judicial resolution of the conflict." *Burwell*, 130 F. Supp. 3d at 68 (citing *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974), and *United States v. Nixon*, 418 U.S. 683 (1974)). In determining whether there is a valid Congressional appropriation for the Administration's transfer, obligation, and expenditure of funds to construct a border wall, "it is the court that has the last word and it should not shrink from exercising its power." *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 202 (D.C. Cir. 1984) (cleaned up).

Finally, the Administration argues that, even if the House demonstrates Article III standing, the Court should dismiss the case under the "doctrine of equitable discretion." Opp'n at 36-38. That doctrine does not appear to have been applied by the D.C. Circuit in more than two decades, *see* Opp'n at 37 (citing *Chenoweth*, 181 F.3d at 114-15 (questioning continued viability of equitable discretion doctrine), notwithstanding multiple cases involving inter-branch disputes that courts in this district have decided in the interim without resort to the doctrine, *see supra* p. 15 n.13. As explained, the Administration's contention that Congress should "be required to enact legislation" before it may seek judicial intervention, Opp'n at 36-37, misses the fundamental fact that the Administration has already defied the appropriations act enacted by Congress, and is no reason to resurrect a long-defunct doctrine.

## II. THE HOUSE HAS A CAUSE OF ACTION

The Administration argues that the House "lacks a cause of action under which it could bring [its claims] in this Court." Opp'n at 38. That argument is incorrect.

**1.** The House has a viable cause of action in equity to seek injunctive relief against the Administration's unconstitutional expenditures to construct a border wall in violation of the Appropriations Clause. "Injunctive relief has long been recognized as the proper means" to

prevent federal officials "from acting unconstitutionally." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001). Because injunctive actions seek simply "to halt or prevent [a] constitutional violation rather than the award of money damages," they do "not ask the Court to imply a new kind of cause of action." *United States v. Stanley*, 483 U.S. 669, 683 (1987).[10] "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015).[11]

The Supreme Court has made clear its willingness to recognize causes of action for violations of structural provisions of the Constitution, including for violation of the Appropriations Clause and separation of powers. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). There is no reason to treat the Appropriations Clause claim at issue here any. *See id.* ("If the Government's point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so."). This is consistent with the presumption "that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen v. Mich. Acad. of Family*

[10] For this reason, the Administration's reliance on *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), is misplaced. *See* Opp'n at 39-40. Central to the Court's holding in *Abbasi* was the fact that the case addressed the availability of a *damages remedy* under the implied cause of action theory adopted in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[11] *See also* 1 Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* § 49 (12th ed. 1877), at 40 (equity jurisdiction exists where "a wrong is done, for which there is no plain, adequate, and complete remedy in the courts of common law"); *Del. Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 895 F.3d 102, 107 (D.C. Cir. 2018) ("The Supreme Court has recognized an implied action for prospective relief against allegedly unconstitutional actions by federal officials.").

*Physicians*, 476 U.S. 667, 681 (1986). Indeed, the Constitution's "separation of the powers of government presupposes that independent federal courts were to perform the function of adjudication in the exercise of the judicial powers vested in them in Article III." James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward A First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. Rev. 899, 945-46 (1997).[12] Accordingly, courts have recognized that the House has an equitable cause of action under the Constitution to defend its institutional prerogatives.[13]

The Administration contends that "the fact that *private parties* have historically been able to obtain injunctive relief against federal executive officials does not suggest that *federal legislators* can obtain such relief." Opp'n at 40. The Administration's emphasis is wrong: In determining whether plaintiffs have a cause of action in equity, the focus is not on the identity of the plaintiffs, but on what relief they seek. Specifically, the Supreme Court has explained that the jurisdiction of the federal courts includes the "authority to administer in equity suits the principles of the system of *judicial remedies* which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Grupo Mexicano*

[12] The Administration suggests that the courts' equitable jurisdiction only permits "potential defendants in legal actions to raise in equity a defense available at law." Opp'n at 39 (citing *Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014)). But that assertion cannot be squared with the extensive history of courts enjoining the illegal conduct of federal officials outside of these circumstances. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) (affirming injunction issued against Secretary of Commerce by district court in *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569 (1952)).

[13] *See, e.g.*, *Burwell*, 130 F. Supp. 3d at 78-79 ("[T]he Court finds that the House has an implied cause of action under the Constitution itself."); *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 94 (D.D.C. 2008) ("The Court concludes that the Committee has an implied cause of action derived from Article I to seek a declaratory judgment concerning the exercise of its subpoena power."); *Blumenthal*, 2019 WL 1923398, at *12 (finding implied cause of action under Foreign Emoluments Clause).

*de Desarrolo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (emphasis added); *see also Morales Feliciano v. Rullán*, 378 F.3d 42, 50 (1st Cir. 2004) ("[T]he relevant question is not whether a specific application of relief was available in 1789, but, rather, whether that general type of relief was available."). Here, the House seeks injunctive relief against federal officials. An injunction is the paradigmatic example of relief historically afforded by courts of equity; it is not "a type of relief that has never been available before." *Grupo Mexicano*, 527 U.S. at 322.[14]

Even if it were relevant, the Administration's suggestion that courts of equity have historically offered relief only to private parties is also incorrect. The "general rule" was that "all sorts of conditions of persons, from the highest to the lowest, may sue in Courts of Equity," including "[t]he King or Government" and other "bodies politic and corporate." Joseph Story, *Commentaries on Equity Pleadings* §§ 49-50 (4th ed. 1848). The Court of Chancery thus provided equitable relief, for example, in cases "[w]here the Crown's interests [were] directly concerned." George Stuart Robertson, *The Law and Practice of Civil Proceedings by and Against the Crown and Departments of the Government* 464 (1908) (Robertson); *see id.* at 471 (noting actions by the Attorney-General on behalf of the Crown for "[r]ecovery of Treasure Trove"); *see also* 2 Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* §§ 1147 nn.1 & 2, 1153 n.1 (9th ed. 1866) (noting actions by the Attorney General on behalf of the Crown, including actions against other government officials).

[14] The Administration asserts that "Congress is well aware of how to create an express cause of action for itself or for individual legislators." Opp'n at 38. But again, that is no answer when the House is suing the Executive to enforce the Constitution. *See Holder*, 979 F. Supp. 2d at 19, 22-23; *Miers*, 558 F. Supp. 2d at 81 ("[W]here the Constitution is the source of the right allegedly violated, no other source of a right – or independent cause of action – need be identified.").

Nor was this ability to obtain relief from the Court of Chancery limited to the Crown. *See* Robertson at 466 ("[A]n authority, which has statutory control over the matter in respect of which a breach is alleged to have occurred, may sue alone to restrain such alleged breach."); Principal Sec'y of State for the Home Dep't, *Calendar of Chancery Warrants Preserved in the Public Record Office: A.D. 1244-1336*, at 134 (1927) (noting mandate issued "at the request of the commons of the county of Devonshire, to appoint suitable persons to make the perambulation in the county without delay"); Cecil Monro, *Selections from the Records of the Court of Chancery, Remaining in the Office of Reports and Entries* 448 (1847) (noting suit by Member of Parliament against mayor "for certain fees for his attendances in the Parliament"). For example, members of the House of Commons applied to the Court of Chancery for relief with respect to their legislative privilege to attend sessions of Parliament. *See, e.g.*, Jefferson's Manual § 288 (115th Cong.);[15] W. Burdon, *A Brief Treatise on the Privileges of the House of Commons* 10-12 (1810).

Accordingly, the House can sue to protect its central constitutional powers, and is entitled to injunctive and declaratory relief. *See* Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.

**2.** Even if the House lacked a cause of action under principles of equity, the House has an independent cause of action under the APA, 5 U.S.C. § 500 *et seq.* The Administration incorrectly asserts that the House cannot sue under the APA. Opp'n at 41-42. But both the statutory text and the relevant authorities clearly support such a suit by the House.

The APA provides for judicial review of an action brought by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. The applicable statutory definitions in turn state that "agency" "means each authority of the Government of the United States, whether or not it is within or subject to review by another

[15] *Available at* https://tinyurl.com/Manual115thCong.

agency, but does *not* include . . . *the Congress*," *id.* § 701(b)(1)(A), and that "'person' *includes* an individual, partnership, corporation, association, or *public* or private *organization* other than an *agency*," *id.* § 551(2) (emphases added); *see id.* § 701(b)(2) ("'[P]erson' . . . ha[s] the meaning[] given . . . by section 551[.]").

Under these definitions, the House is a "person" that may litigate APA claims. Congress defined the term "person" expansively, offering a non-exhaustive list of "persons" who may bring APA suits that "includes" "public . . . organization[s]." 5 U.S.C. § 701(b)(2).[16] Congress specified only one entity that may not sue – an "agency" – a term it expressly defined to *exclude* "Congress." Congress thus knew how to exempt itself from being *sued* under the APA and would have done the same if it also wished to exempt itself from *suing* as a "person." *Cf. PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 792 (D.C. Cir. 2004) ("Very rarely has Congress withheld judicial review from those who have suffered an Article III injury at the hands of an administrative agency.").

*Burwell* squarely rejected the argument the Administration raises here, correctly concluding that the House is a "person" under the APA. 130 F. Supp. 3d at 78. Other courts have similarly construed the term broadly to include all manner of government bodies.[17] As the D.C. Circuit explained in holding that a Maryland agency "could be considered a 'public . . . organization'" under section 551(2), there is "no warrant for reading into . . . § 551(2) a limitation on the term 'person' that Congress neither put there nor demonstrated any intention to put there."

[16] *See Burgess v. United States*, 553 U.S. 124, 133 n.1 (2008) ("[T]he word 'includes' is usually a term of enlargement, and not of limitation." (quotation marks omitted)).

[17] *See Gov't of Manitoba v. Bernhardt*, No. 17-5242, 2019 WL 1966792, at *5 (D.C. Cir. May 3, 2019) ("There is little doubt that a State qualifies as a 'person' under the APA."); *Md. Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985) ("If a foreign government and its agencies are persons within the meaning of the APA, it seems clear that a state and its agencies also are.").

*Md. Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985) (quotation marks omitted).

The Administration primarily relies on *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding*, 514 U.S. 122 (1995), which held that the Director of the Department of Labor's Office of Workers' Compensation Programs was not a "person adversely affected or aggrieved" under the relevant statute because the term "person" did not include an "agency acting in its governmental capacity." *Id.* at 129-30. *Newport News* thus stands for the unremarkable proposition that an "agency" is not a "person adversely affected or aggrieved." The case says nothing about the question presented here: whether the House – expressly exempted under the APA's definition of "agency" – is a "person" that can sue under the APA. *Accord Burwell*, 130 F. Supp. 3d at 78 ("*Newport News* . . . says 'an *agency* acting in its governmental capacity' is not a person aggrieved . . . [and] does not control this case[.]").

## III. THE HOUSE IS ENTITLED TO A PRELIMINARY INJUNCTION

This Court's intervention is urgently needed to protect the status quo and avoid irreparable injury to the House. The Administration is set to begin construction on the border wall this month using funds that have not been validly appropriated for that purpose, and the House is likely to prevail on its claims that these expenditures are unconstitutional and a violation of the APA.

### A. The House Is Likely to Succeed on the Merits of Its Claims

The Administration first attempts to avoid the constitutional claims by recasting the House's Appropriations Clause counts as "statutory" claims, asserting that "[t]he House's constitutional claims do nothing more than allege statutory violations of § 8005 and § 2808." Opp'n at 42-43. This argument mischaracterizes the House's suit, as discussed above. *See supra e.g.* 9, 10. Because the Administration lacks statutory authorization, its spending violates the Appropriations Clause.

**1.** As the House explained in its opening brief, section 8005 does not authorize the transfer of funds for purposes of constructing a border wall under section 284. Pl.'s Mem. in Supp. of Appl. for Prelim. Inj. (ECF 17) (Mem.) at 29-34. The Administration cannot satisfy the plain terms of section 8005.

Section 8005 authorizes transfers for "*unforeseen* military requirements."[18] Border wall construction is neither unforeseen nor a military requirement. The term "unforeseen" means "[n]ot foreseen; not expected."[19] The Administration argues that the term must be understood "in the specific context of the budgeting process." Opp'n at 47. But even in that context, the undisputed facts do not support the argument that the Department of Defense's (DOD) need "to construct fencing in drug trafficking corridors" "did not arise until February 2019." Opp'n at 47.

Five days after President Trump took office, he issued an executive order requiring DHS to "[i]dentify . . . *all sources of Federal funds* for the planning, designing, and constructing of a physical wall along the southern border."[20] In April 2018, the President issued a memorandum to the Secretary of Defense to support DHS in "securing the southern border."[21] It was public knowledge by December 2018 that DOD was considering using section 284 to construct a border

[18] Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. A, tit. VIII, § 8005 (2018) (to be printed at 132 Stat. 2981, 2999) (emphasis added).

[19] *Unforeseen*, Black's Law Dictionary (8th ed. 2004); *see also, e.g.*, *Viterbo v. Friedlander*, 120 U.S. 707, 731 (1887) ("unforeseen event, (meaning thereby, as we have seen, any fortuitous event or irresistible force[])").

[20] Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8794 (Jan. 25, 2017) (emphasis added).

[21] Presidential Memorandum for the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security, White House (Apr. 4, 2018), https://tinyurl.com/PresidentialMemorandum.

wall.[22] Moreover, the House understands that DOD may have considered using section 284 to construct a border wall as early as the beginning of 2018 – before Congress approved DOD's appropriations bill in September 2018.[23]

In addition, as the Administration appears to acknowledge, DOD's role has not been a "military" one; its support has included "hardening U.S. ports of entry, erecting temporary barriers, and emplacing concertina wire." Opp'n at 7. These circumstances do not constitute "an unforeseen military requirement," and this point alone is a sufficient reason to find that the House is likely to prevail on its Appropriations Clause and APA claims with respect to the section 284 funding.

The Administration has also transferred funds under section 8005 to construct a southern border wall, while claiming the transfer is not for an "item" that "has been denied by the Congress." *See* Opp'n at 48. But Congress clearly rejected President Trump's request for $5 billion for a border wall. *See* Mem. at 7-11. This is what the "denied by the Congress" limitation in section 8005 was designed to prevent: DOD "undoing the work of the Congress" through the reprogramming process. H. Rep. 93-662, at 16 (1973). The Administration responds that Congress did not "deny" any request for "'the item' referenced in the transfer – namely counter-

[22] *See, e.g.*, Ryan Browne, CNN, *As Trump Weighs Having Military Build Border Wall, Some Troops Begin Coming Home From Border* (Dec. 11, 2018, 6:58 PM), https://tinyurl.com/CNNDec2018.

[23] On April 25, 2018, DOD responded to a request for information from the House Committee on Armed Services concerning DOD's comparatively low counter-drug spending in FY 2018. DOD noted that "the primary factor that led to curtailed support in FY18 was a combination of continuing resolution, followed by DoD Comptroller withholding over 85% ($947 million) of [counter-drug] appropriated funds for distribution until the 4th Quarter for possible use in supporting Southwest Border construction last fiscal year." Decl. of Paul Arcangeli, Ex. A to Mot. for Leave to File Suppl. Decl. (ECF No. 44-1). This information suggests "that DoD was considering using its counter-drug authority under 10 U.S.C. § 284 for southern border construction in early 2018." Arcangeli Decl. ¶ 3.

drug activities funding . . . under section 284." Opp'n at 48. However, the Administration offers no support for the position that the pertinent "item" at issue here is counter-drug activities funding under section 284 generally, rather than the construction of a border wall. Indeed, Acting Secretary Shanahan has stated that the "items" at issue here are "Yuma Sector Projects 1 and 2 and El Paso Sector Project 1," *i.e.*, the construction of a border wall in these sectors, not general counter-narcotics projects. Rapuano Decl., Ex. C (ECF No. 36-8).

Section 8005 further restricts transfers of funds to be used for "military construction." The section authorizes transfers of "funds made available in this Act to the Department of Defense for military functions (*except military construction*) between such appropriations or funds." Pub. L. No. 115-245, div. A, tit. VIII, § 8005 (emphasis added). As the House has argued, construction of border wall fencing is not military construction because the border is not a military installation. Mem. at 33, 36-38.[24] To construct its border wall, however, the Administration, invoked not only section 8005, but also section 2808(a) – which only allows expenditures on military construction. The Administration cannot have it both ways. If funds that Congress never appropriated for border wall construction are being moved for "military construction," that is not authorized under section 8005 and section 284. But if funds are being expended for non-military construction purposes, that is not authorized under section 2808(a).

The Administration attempts to avoid the necessary implication of its arguments by contending that because the drug interdiction fund is not a "specifically designated military construction" appropriation, transferring funds from military personnel expenses to the drug interdiction fund is consistent with section 8005. *See* Opp'n at 47-50. But the text of section 8005

[24] Because border barrier construction is not "military construction," it is unsurprising that Congressional committees have previously voiced no objection to transfers of funding under section 8005 for that purpose. *See* Opp'n at 49.

means that the restriction applies based on the purpose of the transfer, not the label assigned to the funds: Funds can be transferred "*for* military functions," except when those functions are "military construction." Pub. L. No. 115-245, div. A, tit. VIII, § 8005. Here, the Administration is transferring funds to construct a border wall. If that construction is "military construction," then the transfers directly violate section 8005. Moreover, section 8005 applies only to DOD "working capital funds" or "funds made available in this Act," and neither DOD's "working capital funds" nor the 2019 defense appropriations bill contains appropriations or funds "specifically designated for military construction." Thus, if the Administration's interpretation were correct, the military construction exception would be surplusage – an interpretation this Court should avoid. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018).

Contrary to the Administration's restrictive view, the military construction exception is among the provisions that reflect Congress's view "that funds appropriated for Operations and Maintenance in the Department of Defense should not be used for the construction of major new facilities." S. Rep. 92-498, at 9 (1971) (discussing provision capping the amount of operations and maintenance funding available for minor construction projects); *see* 10 U.S.C. § 2805 (permanently limiting DOD's authorization to "spend from appropriations available for operation and maintenance amounts necessary to carry out an unspecified minor military construction project" to "not more than $2,000,000"). The exception is designed to ensure, among other things, that where DOD has unused operations and maintenance funding near the end of the fiscal year, DOD should "let them lapse at the end of the period," H. Rep. 93-662, at 17, rather than cobble together the excess funds to undertake major military construction projects that Congress did not

otherwise fund, *see* S. Rep. 92-498, at 10 ("It is not the intent of the committee that this expanded [transfer] authority be used to initiate the development and procurement of weapons systems.").[25]

The military construction exception therefore forecloses the Administration from transferring funds under section 8005 to fund military construction projects. And if the Court holds that construction of a border wall is a military construction project for purposes of section 2808(a), then the Administration cannot transfer funds under section 8005 for purposes of border wall construction under section 284.

**2.** Significantly, the Administration does not here argue that section 2808(a) authorizes constructing a border wall. *See* Opp'n at 51-53. The Administration only contends that "the Acting Secretary of Defense has not yet decided to undertake or authorize any barrier construction project under § 2808." Opp'n at 51. The House has standing to challenge the section 2808(a) expenditures and the claim is ripe now. As the Administration concedes, the House does not have to wait for money to be spent under section 2808(a) before it may seek relief; the House need only show that there is a "substantial risk" that the harm will occur. Opp'n at 51 (citing *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quotation omitted)). The House readily satisfies this standard.

In conjunction with President Trump's emergency proclamation, the White House "publicly released a fact sheet announcing the sources of funding to be used to construct additional barriers along the southern border," which include section 2808(a). Opp'n at 9. There is no dispute

[25] *See also* H. Rep. 95-1398, at 385 (1978) ("It was clearly not the intent of the Congress that the expanded authority be used to initiate the development and procurement of weapons systems."). Notably, the referenced development of weapons systems in these reports constituted "military construction" under the applicable DOD appropriations bills. *See* Department of Defense Appropriation Act, 1972, Pub. L. 92-204, tit. VIII, 85 Stat. 716, 735 (1971).

that DOD has already identified military construction projects it could cut to finance the construction of a border wall under section 2808(a), and that its FY 2020 budget request includes an additional "$3.6 billion for funding any [military construction] projects delayed as a result of the emergency declaration."[26] And on May 8, 2019, DOD announced that it had "solicited via the internet" bids for "each order of the $5,000,000,000 firm-fixed-price contract for design-build, design-bid-build horizontal construction task orders in support of the Department of Homeland Security San Diego, El Centro, Yuma and Tuscon Border Patrol sectors, and the U.S. Army Corps of Engineers South-Western Division and South Pacific Division."[27] Unless DOD plans to use a source of funding not identified on the White House Fact Sheet, the only way DOD can spend $5 billion on the construction of a border wall is by using section 2808(a) to spend up to $3.6 billion of unobligated military construction funds. There is therefore, obviously, a "substantial risk" that DOD will shortly expend funds under section 2808(a) to construct a border wall.

The House's claim with respect to section 2808(a) is also ripe for judicial review and this Court need not delay resolution of the claim. In determining ripeness, courts consider both "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003).

The legal issues presented by the House's claim are fit for judicial review. *See* Mem. 34-40. The Administration does not address the House's arguments that the supposed national emergency does not require the use of the armed forces and that construction of a border wall does

[26] U.S. Dep't of the Army, Military Construction (Part IA OCO/Emergency), at 21, in *Department of the Army Fiscal Year (FY) 2020: President's Budget Submission (2019)*, https://tinyurl.com/ArmyFY2020Budget.

[27] *Contracts for May 8, 2019*, U.S. Dep't of Def. (May 8, 2019), https://tinyurl.com/DODMay8Contracts.

not constitute "military construction," and it offers no reason to believe that these issues are not fit for decision at this time. *See* Opp'n at 51-53. Nor could they. The Acting Secretary of Defense recently admitted that the situation at the southern border is "not a military threat,"[28] and another top-level defense official has testified that "[n]one of the capabilities that we are providing [at the southern border] are combat capabilities."[29] As the House has already established in our opening brief, the southern border is not a "military installation" and is therefore not "military construction" for purposes of section 2808(a). Mem. at 36-38. Tellingly, the military publishes a list of domestic military installations; the southern border is not on it.[30]

The Administration argues that the question whether a border wall is "necessary to support the armed forces" is not appropriate for resolution at this time because the Secretary "will determine [whether a] project is 'necessary to support such use of the armed forces' . . . within the context of . . . authorizing specific military construction projects." Opp'n at 52. DOD's May 8, 2019 solicitation announcement, discussed above, suggests that the construction of a border wall will support "the U.S. Army Corps of Engineers South-Western Division and South Pacific Division."[31] As the House explained – and the Administration has not addressed – there is no

[28] *Department of Defense Budget Posture: Hearing Before the S. Comm. on Armed Servs.*, 116th Cong. (2019) (statement of Patrick Shanahan, Acting Sec'y, U.S. Dep't of Def.) (pre-published stenographic transcript at 51, available at https://tinyurl.com/DefenseBudgetHearing).

[29] Heather Timmons, *The US Border Situation Isn't a National Emergency, Pentagon Officials Tell Congress*, Quartz (Jan. 29, 2019), https://tinyurl.com/QuartzBorder; J. Decl. of Former U.S. Gov't Officials ¶ 9 (Attachment B to Former Members' Br.) (explaining that Administration's claim that armed forces are required is "implausible").

[30] U.S. Dep't of Def., *Base Structure Report – Fiscal Year 2018 Baseline*, https://tinyurl.com/MilitaryInstallationsList.

[31] In addition, the Administration notes that "assessments by the Chairman of the Joint Chiefs of Staff and the DoD Comptroller" with respect to projects under section 2808 were due May 10, 2019. Opp'n at 14.

reason to believe that a border wall is necessary to support these or any other troops stationed at the border. Mem. at 38.

Deferring consideration of the section 2808(a) issues would prejudice the House. The Administration is moving quickly to construct a border wall. *See supra* p.3 n.1. The Administration has already obligated contracts under section 284 against the $1 billion of transferred funds and is set to begin construction by the end of this month. *See* Opp'n at 11. If the Court defers consideration of the House's claim with respect to section 2808(a), DOD may move quickly to award similar contracts against billions of dollars of unappropriated funds before the House has had an opportunity to have its claim determined by this Court.[32] And if DOD expends unappropriated funds while this case is pending, the Government cannot claw those funds back if the House ultimately prevails on its claims.

In any event, the Administration recognizes that it has a statutory obligation to notify Congress "[w]hen a decision is made to undertake military construction projects" under section 2808(b). Opp'n at 52 (quoting 10 U.S.C. § 2808(b)). If the Court determines – on the basis of the Administration's representations in its filings before this Court – that the section 2808 claim is not ripe, it should order the Administration to notify the Court and the parties immediately if a decision is made to "undertake or authorize any barrier construction project under § 2808." Furthermore, at that time and *before* any funds are obligated, the House should be given the opportunity to renew its request for a preliminary injunction against those planned expenditures.

[32] Notably, Congress has made it illegal to "involve [the United States Government] in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). This provision is among the "various statutory provisions" that reflect "[t]he Congressionally chosen method of implementing" the Appropriations Clause. *Harrington*, 553 F.2d at 194-95.

### B. The House Is Likely to Suffer Irreparable Injury Absent a Preliminary Injunction

As an initial matter, the Administration does not dispute that the unconstitutional transfer, obligation, and expenditure of funds during the pendency of this litigation will irreparably harm the House. *See* Opp'n at 53-55. The Administration instead advances an argument that is largely repetitive of its standing arguments and mischaracterizes the harm alleged. *See* Opp'n at 53-54. As explained above, the appropriations injury suffered by the House is not just concrete and particularized, but "particularly insidious." *Burwell*, 130 F. Supp. 3d at 73.

Citing two out-of-circuit district court cases, the Administration claims that only violations of "personal" rights, and not the Constitution's "structural" provisions, can constitute irreparable harm. Opp'n at 53-54 (citing *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 545 F. Supp. 2d 363, 367 (S.D.N.Y. 2008), *rev'd on other grounds*, 556 F. 3d 114 (2d Cir. 2009); *Am. Petroleum Inst. v. Jorling*, 710 F. Supp. 421, 431 (N.D.N.Y. 1989)). Those cases rejected an individual plaintiff's argument that a violation of the Supremacy Clause constituted *per se* irreparable harm; they did not hold that a violation of a structural constitutional provision could never constitute irreparable harm. *See N.Y. State Restaurant Ass'n*, 545 F. Supp. 2d at 367; *Am. Petroleum Inst.*, 710 F. Supp. at 432. Moreover, the House's alleged injury here is a usurpation of one of its most important authorities under Article I. Indeed, the Administration itself has characterized section 8005 as a "provision that exists to govern the relationship between Congress and DoD." Defs.' Opp'n to Mot. for Prelim. Inj. at 13, *Sierra Club v. Trump*, No. 4:19-cv-892-HSG (N.D. Cal. Apr. 25, 209) (ECF No. 64).

The Administration's claim that "the House's alleged institutional injury is not 'irreparable,'" Opp'n at 54, is unavailing. The Administration has stated that wall construction is

"[m]oving quickly."[33] Mem. at 41. It has also already transferred and obligated funds for purposes of constructing a border wall under section 284, and its construction of a border wall under section 2808(a) is imminent. *See* Mem. at 41; *see also supra* p. 3 n.1. The Administration claims only that "[t]he House will . . . have the opportunity to pursue and vindicate its institutional interests in the full course of this litigation." Opp'n at 54. But that claim is not correct.

The Administration does not dispute that, if funds are expended on a border wall while this case is being litigated, those funds cannot be recovered. At that point, there is no way for Congress to regain its constitutional authority to control the expenditure of those funds. The Administration asserts that "the House can change or restrict § 2808 and § 8005 through the legislative process," and thus the injury is "not irreparable." Opp'n at 55. As discussed above, that argument misunderstands the legislative process and Congressional authority under the Appropriations Clause, which provides that the Executive Branch may spend money only pursuant to a valid Congressional appropriation, not that the Executive Branch may spend money however it pleases absent a Congressional prohibition.

**C. The Balance of the Equities Favors a Preliminary Injunction**

The balance of the equities weighs strongly in favor of a preliminary injunction, and the Administration cannot show otherwise. The Administration principally argues that the House lacks standing and an irreparable injury, but those arguments are incorrect as discussed above. *See supra* pp. 3-13, 28-29. As explained, the Administration's unconstitutional expenditure of funds in the absence of a valid appropriation inflicts a "particularly insidious" injury on the House.

[33] Donald J. Trump, @realDonaldTrump (Jan. 20, 2019, 6:20 AM), http://tinyurl.com/20Jan2019Tweet.

*Burwell*, 130 F. Supp. 3d at 73. Once made, these unconstitutional expenditures cannot be undone, and the grave institutional injury inflicted on the House cannot be remedied.

The Administration claims that "preventing the construction of border barriers would harm the Executive's 'weighty' interest in border security and enforcement of immigration laws." Opp'n at 55 (citing *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)). Yet *Landon* provides only that "[t]he government's interest in efficient administration of the immigration laws at the border is also weighty" and that "matters of immigration [are] . . . largely within the control of the executive *and the legislature*." *Landon*, 459 U.S. at 34 (emphases added). And, of course, control over appropriations relating to immigration lies solely with Congress. The applicable appropriations laws here reflect Congress's decision to "not fund President Trump's wasteful wall." 165 Cong. Rec. S1362 (daily ed. Feb 14, 2019) (statement of Sen. Leahy). The efficient administration of the immigration laws in this case is served by following the appropriations law. And the Administration does not suffer any cognizable harm when it is prevented from acting illegally. *See* Mem. at 42-43.[34]

Moreover, the Administration does not dispute that the Executive Branch has numerous "other tools at [its] disposal" – tools that Congress *has* authorized and funded – to secure the

[34] The Administration asserts that "[b]order walls have proven to be extremely effective at stopping drugs and migrants from unlawfully crossing the southern border." Opp'n at 55. But it relies on a declaration that cites facts relating to the effectiveness of border barriers at reducing illegal crossings in the 1990s and early 2000s – when, as the Administration explains, most individuals who illegally crossed were "single adults from Mexico." Opp'n at 8, 55 (citing Martin Decl. (Opp'n Ex. 2)). The rise in illegal crossings in recent years is due to families and children from Central America who enter the United States to claim asylum. *See id.* at 8. These individuals are not looking to evade detection, and the Administration offers no reason to believe that a border wall would be effective at addressing the humanitarian issues they present. *See also* J. Decl. of Former U.S. Gov't Officials ¶ 7 (Attachment B to Former Members' Br.).

border. *See League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 13 (D.C. Cir. 2016); Mem. at 43 & n.112. And there is no reason that the funds "must be [spent] *at this time*, as opposed to after a resolution on the merits of [the House's] claims." *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 27 (D.D.C. 2009) (emphasis added). President Trump himself stated that he "could do the wall over a longer period of time" and that he "didn't need to do this."[35]

**D. The Public Interest Favors a Preliminary Injunction**

The Administration agrees that the public interest factor "merge[s]" with the balance of the equities in this case. Opp'n at 55. Because the balance of the equities favors a preliminary injunction, *see supra* pp. 29-31, the public interest also favors a preliminary injunction. The Administration does not dispute that "[t]here is generally no public interest in the perpetuation of unlawful agency action," *League of Women Voters*, 838 F.3d at 12, and that "it may be assumed that the Constitution is the ultimate expression of the public interest," *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (quotation marks omitted).

The Administration should not be permitted to make unconstitutional expenditures while this case is being litigated. Given the speed with which the Administration is proceeding, it could obligate and spend a substantial portion – if not all – of the challenged funds before this Court has had the opportunity to fully consider the legality of those expenditures. *Cf. Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929) ("If the tax be paid during the pendency of the suit, and the statute be adjudged invalid by the final decree, the plaintiff will be remediless."). This case warrants preliminary relief "to preserve the relative positions of the parties until a trial on the

[35] *See Remarks by President Trump on the National Security and Humanitarian Crisis on Our Southern Border*, White House (Feb. 15, 2019, 10:39 AM), http://tinyurl.com/TrumpRoseGardenRemarks.

merits can be held." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quotation marks omitted).

## CONCLUSION

The Court should issue a preliminary injunction prohibiting the Administration from spending funds in excess of Congressional appropriations for counter-narcotics support under section 284 and from spending funds under section 2808(a) on the construction of a wall along the southern border.

Respectfully submitted,

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May 15, 2019

[*] The Office of General Counsel wishes to acknowledge the assistance of law clerks Sarah Friedman and Lily Hsu, students at The George Washington University Law School, and Nate King, a student at The Catholic University of America, Columbus School of Law in preparing this brief.

**CERTIFICATE OF SERVICE**

I hereby certify that on May 15, 2019, I caused the foregoing document to be filed via the U.S. District Court for the District of Columbia's CM/ECF system, which I understand caused a copy to be served on all registered parties.

*/s/ Douglas N. Letter*
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# General Information

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|---|---|
| **Court** | United States District Court for the District of Columbia; United States District Court for the District of Columbia |
| **Federal Nature of Suit** | Other Statutory Actions[890] |
| **Docket Number** | 1:19-cv-00969 |